PACIFIC BANK BHD.

v.

FUNG YEN ENTERPRISE (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C2-23-3176-1986]
12 SEPTEMBER 1988

CIVIL PROCEDURE: *Striking out of defence O. 18 r. 19 RHC - Banking - Guarantee - Undated - Variation of credit clause - Guarantee for main lines of credit - Not granted - Whether liable under temporary credit - Request for cancellation of guarantee - Issue determinable by oral evidence.*

The second and third defendants were sued on a written undated guarantee given by them in 1984 where in consideration of the first plaintiff making or continuing advances to the first defendant they guaranteed to pay the plaintiff all sums due from the first defendant to a limit of RM1.5 million ("the 4 main lines of credit"). This guarantee was one of the 4 securities requested by the plaintiff for 4 lines of credit. Pending processing of these lines of credit, a temporary credit for RM150,000 was granted - the securities for this as stipulated in the letter of offer did not include a guarantee from the second and third defendants. The 4 main lines of credit were thereafter never granted due to the failure of the first defendant to provide all the security required. The first defendant failed to make payment for the sums due under the temporary facility and the plaintiff sued the second and third defendants as guarantors for the same.

The second and third defendants pleaded that upon failure of the first defendant to provide all the security required, the 4 main lines of credit approved were withdrawn and that upon this they had demanded the cancellation of the guarantee. The second and third defendants also maintained that they had not executed any guarantee in respect to the temporary facilities.

The plaintiff relied on part payments made by the third defendant and certain clauses of the guarantee allowing (i) variation of credit without approval of guarantors and (ii) waiver of the second and third defendant's rights against the plaintiff and first defendant.

The Senior Assistant Registrar refused judgment and the plaintiff appealed.

Held:

[1] As the guarantee was for the RM1.5 million loan the provisions therein must refer to the RM1.5 million loan.

[2] From the documents, it does not appear to be the intention of the parties to extend liability under the guarantee to the temporary advance as the guarantee was executed solely for the purpose of the RM1.5 million loan and no other.

[3] The third defendant's efforts to have the guarantee cancelled cannot be disregarded and the statement of defence has raised issues which can only be determined by oral evidence.

[Appeal dismissed.]

Legislation referred to:
Rules of The High Court 1980, O. 18 r. 19

For the plaintiff/appellant - C.K. Kang; M/s. Nahappan & Peri
For the second and third defendant/respondents - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Siti Norma Yaakob J:

The application before me is an appeal by the plaintiff against the Senior Assistant Registrar's refusal to strike out the statement of defence of the second and third defendants under O. 18 r. 19 of the Rules of High Court 1980.

The second and third defendants are sued as guarantors pursuant to an undated letter of guarantee they had signed with the plaintiff in 1984 wherein, in consideration of the plaintiff making or continuing advances to the first defendant, they guaranteed to pay the plaintiff all sums due from the first defendant to the limit of RM1.5. million.

It is not disputed that the guarantee was one of the securities asked for by the plaintiff following their approval of 4 lines of credit to the first defendant totalling RM1.5 million, the terms and conditions of which are contained in their letter dated 25 June 1984.

Apart from the second and third defendant's guarantees, the plaintiff had also asked for 3 other securities namely, a debenture for RM1.5 million over the first defendant's fixed and floating assets, both present and future, a first legal charge for RM1.3 million over 4 specified landed properties, and a second legal charge for RM200,000 on the same properties. The debenture and charges were executed but were not perfected due to the problem of redeeming certain of the properties which had already been charged to other financial institutions.

However, as an interim measure, the plaintiff in their letter dated 28 June 1985 approved a temporary line of credit to the first defendant for the total sum of RM213,000 made up of an overdraft facility of RM133,000 and a letter of credit/trust receipt facility of RM80,000. These temporary facilities were to be secured in the following 2 ways:

1) RM63,000 in overdraft against a fixed deposit held under receipt No. 126563 for RM64,900.70 and

2) RM70,000 in overdraft plus letter of credit/trust receipt of RM80,000 against a first third party charge of RM150,000 on a piece of property belonging to one Ms. Lim Siew Tin.

On 7 August 1985, the first defendant's board of directors passed a resolution accepting the plaintiff's offer of the temporary facilities for a lesser sum totalling RM150,000 to be secured in the manner specified by the plaintiff in their letter dated 28 June 1985.

It is in respect of advances made by the plaintiff to the first defendant on the temporary facilities and the first defendant's failure to repay such advances that the present action is founded against the second and third defendants as the guarantors of such advance payments.

In their statement of defence, both the second and third defendants have pleaded that when the first defendant had failed to provide sufficient security for the original line of credit totalling RM1.5 million, the plaintiff had naturally withdrawn their approval for the RM1.5 million credit. The second and third defendants had then demanded that the personal guarantees that they had executed in 1984 for the RM1.5 million credit be cancelled and that the plaintiff had agreed to do so. As proof they exhibited a letter dated 25 September 1986, written by the third defendant wherein he requested that the guarantee he had signed for the RM1.5 million loan to the first defendant be cancelled and this letter was received by the plaintiff as there is an acknowledgment to that effect in the letter.

The defendants also maintain they did not execute any guarantee for the temporary facilities and in any event the securities for the temporary facilities asked for by the plaintiff in their letter dated 28 June 1985 do not include any personal guarantees from them.

To establish the liabilities of the second and third defendants, the plaintiff relied on two payments made by the third defendant in 1986 towards the guarantee and the provisions of clause 7 and 18 of the guarantee. Evidence of these two payments is found in a letter dated 7 April 1986 written by the plaintiff to the third defendant, acknowledging receipt of the first payment of RM3,000 by the third defendant, which has been placed in a fixed deposit for 24 months and the arrangements of further monthly payments by the third defendant as securities for the credit facilities extended to the first defendant. These arrangements however do not conform to the earlier securities asked for by the plaintiff as contained in their earlier letter dated 28 June 1986. Whilst not denying making such payments, the third defendant contends that he was threatened with bankruptcy proceedings by the plaintiff if he did not come forward to deposit the money but when he was later advised that he had no liability to meet under the guarantee he had stopped making further payments.

Looking at the plaintiff's letter dated 28 June 1986 confirming the temporary facilities for the total sum of RM213,000 and specifying the securities for such facilities, it would appear that this is a separate and distinct transaction to the earlier approval of the RM1.5 million line of credit granted to the first defendant for which the guarantee was executed. The securities demanded of the temporary facilities do not include the personal guarantees of the second and third defendants.

For this, the plaintiff rely on clause 7 and 18 of the guarantee which entitles the plaintiff under clause 7 to vary the credit granted to the first defendant without any further consent from the second and third defendants and under clause 18, both guarantors had waived whatever rights they have against the plaintiff and first defendant.

It is not disputed that the guarantee was executed as one of the securities for the RM1.5 million loan to be granted to the first defendant. As such whatever provisions mentioned in the guarantee must necessarily refer to the RM1.5 million loan which in this case was not disbursed as the plaintiff had failed to provide sufficient security for such a loan. Instead the plaintiff offered temporary facilities to the first defendant which were secured by other securities which did not include any personal guarantee from either the second or third defendants. Thus to make them personally liable under the guarantee for the temporary advances would be to extend liability under the guarantee to include the temporary advances as well. From the documents this does not appear to be the intention of the parties as the guarantee was executed solely for the purpose of guaranteeing payment of the RM1.5 million credit and no other.

In this respect, I cannot altogether shut my mind to the third defendant's effort to have the guarantee cancelled when the loan of RM1.5 million was aborted, a fact that was known to the plaintiff as they had acknowledged receipt of a letter from the third defendant seeking cancellation of the guarantee.

From the documents produced, I do not consider that this is a proper case that calls for the statement of defence to be struck out under O. 18 r. 19. The statement of defence itself has raised issues which can only be determined by oral evidence and accordingly I had dismissed the plaintiff's appeal with costs.

Also found at [1989] 1 CLJ 70